No. 80-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANDERSON BROS. FORD AND
FORD MOTOR CREDIT COMPANY, *Petitioners,*

v.

OLGA VALENCIA AND
MIGUEL GONZALEZ, *Respondents.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRIEF OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Under the Truth in Lending Act and Regulation Z, is an assignment of returned or unearned insurance premiums a "security interest" requiring disclosure on the face of an automobile retail installment sales contract?

2. Since the Petitioners concede that Respondents should recover if Respondents prevail on the merits, have the Petitioners failed to present a case or controversy with regard to their request for prospective-only application as to parties not before the Court?

3. Should Petitioners be liable to the extent prescribed by the Truth in Lending Act when: (a) Congress has in that Act made its own determination of when liability should exist and Petitioners can assert none of the equitable defenses Congress has created; and (b) Petitioners have failed to satisfy any of the criteria for prospective-only application?

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BRIEF OF THE RESPONDENTS

STATEMENT OF THE CASE

The respondent Olga Valencia purchased a used 1974 Ford Pinto from Anderson Bros. Ford on September 30, 1977. Respondent Miguel Gonzalez, her brother-in-law, co-signed for the purchase. The sale was made on a credit basis pursuant to a retail installment contract which Anderson Ford simultaneously executed and assigned to Ford Credit. The price of the automobile was $2340. Valencia paid $1000 as a downpayment and financed the remainder in 24 monthly installments commencing November 2, 1977. The finance charge was $319.84.

The front page of the contract set out certain credit information required by the Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.*, commonly known as the Truth in Lending Act ("TILA" or the "Act"), and by Regulation Z, 12 C.F.R. §226 *et seq.* All required disclosures must be on the front side. 12 C.F.R. §226.8(a). The reverse side of the contract contained form provisions in paragraph 17 requiring that the buyer purchase physical damage insurance for the automobile.[1] One day after signing the contract, Valencia independently purchased a one-year policy of this required insurance for a premium of $215.[2] (R. No. 33, Exh. 19).

Paragraph 17 also provided that the buyer assigned any returned or unearned physical damage insurance premiums to Ford Credit. Returned premiums are those which are prepaid but unearned by the insurance company because the insurance is terminated, for whatever reason, before the completion of the term of insurance covered by the premium.

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[1] Physical damage insurance protects the automobile from damage caused by collision, theft, fire and other hazards. It may also be referred to as "collision and comprehensive insurance" or "casualty insurance," and is separate from liability insurance.

[2] The $442 figure referred to by the court below (J. A. 40), included a charge for liability insurance.

Returned premiums are normally refundable to the purchaser. Because of paragraph 17, however, they are paid to Ford Credit and "shall be applied toward replacement of the Property [defined in the contract as the vehicle] or payment of the indebtedness hereunder in the sole discretion of" Ford Credit. The front page of the contract purportedly discloses the security interests retained by Ford Credit (Contract, ¶12), but contains no reference to the security interest in the insurance premiums.

The respondents filed a complaint against Ford Credit alleging violations of TILA for failure to disclose the security interest in the insurance premiums. The District Court entered summary judgment for the respondents in the amount of $639.68 each.[3] The Court of Appeals for the Seventh Circuit affirmed, holding:

> [A]n assignment of unearned or returned insurance premiums in a consumer credit installment contract is a security interest for purposes of disclosure under the TILA. This result is consistent with the liberal interpretation to be given the Act, the majority of federal court decisions addressing the issue, and a Federal Reserve Board staff interpretation of a closely analogous issue. (J.A. 51).

SUMMARY OF ARGUMENT

1. In 1977 the respondents purchased a used automobile pursuant to a retail installment contract. The Ford Credit form contract included, on its reverse side, a clause assigning to itself any returned physical damage insurance premiums.

The Truth in Lending Act ("TILA") and implementing regulations ("Regulation Z") require that "any security interest" held or to be retained by the creditor must be disclosed. 15 U.S.C. §1638(a)(10); 12 C.F.R. §226.8(b)(5). The

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[3] The Act establishes statutory damages in individual actions in the amount of twice the finance charge, with a $100 minimum and $1000 maximum award for the consumer. 15 U.S.C. §1640(a)(2)(A).

Regulation Z definition of security interest applies to "any interest in property which secures payment . . ." No exceptions are made to the disclosure of "any security interest"; the use of the word "any" in the Act and Regulation Z makes a limited construction of these provisions inappropriate. *Shea v. Vialpando,* 416 U.S. 251, 258 (1974).

Ford Credit's claim to returned insurance premiums constitutes a security interest under TILA and Regulation Z because it is an "interest in property which secures payment or performance of an obligation." 12 C.F.R. §226.2(gg). As such, it must be disclosed on the front of the contract, 12 C.F.R. §226.8(a). Because Ford Credit ordinarily uses the returned premium (after the consumer defaults) for application to the outstanding debt, Ford Credit's property interest "secures payment."

The size of Ford Credit's interest may vary, but returned insurance premiums are often hundreds of dollars — a significant sum to the consumer. The claim to returned insurance premiums is a valuable economic right for the creditor; it provides an attractive form of liquid security which may be expeditiously obtained.

In 1970 the Federal Reserve Board ("FRB") issued a Public Information Letter which required disclosure, as a security interest, of a creditor's claim to returned insurance premiums. This ruling, and other consistent FRB pronouncements requiring disclosure are entitled to substantial deference.

Consumers would benefit from the proper disclosure of Ford Credit's security interest. Disclosure would facilitate the Act's goals of informed use of credit and comparison shopping, and allow consumers to recognize instances where returned premiums are not properly credited to a debt. The disclosure of this security interest can be made concisely and meaningfully. Indeed, many creditors have long done so and Ford Credit's new contract discloses the security interest in five words.

Ford Credit argues that this case should be decided in accordance with the Truth in Lending Simplification and Reform Act ("Simplification Act"), which is not effective until 1982. Congress did not give this revision of TILA retroactive effect. Since the Simplification Act specifically does not release creditors from liability for violations of the Truth in Lending Act occurring prior to the effective date of the amendments, 1 U.S.C. §109 also operates to preclude the extinguishment of Ford Credit's liability.

Nothing in the Simplification Act or its committee reports suggests that it purports to interpret the existing TILA. Congress intended to change prospectively security interest and other disclosure requirements. Ford Credit relies on a single statement by one legislator for the proposition that the Simplification Act amendments reflect Congress' intent in passing TILA in 1968. The statement, however, contradicts the committee report and the legislator was not a member of Congress at the time TILA was enacted.

Ford Credit also relies on an unadopted, proposed FRB staff interpretation, FC-0173, which the FRB has stated "may not be relied upon until final action is taken." The FRB released proposed FC-0173 with a request for comments and a warning that it was being issued merely as a proposal rather than in final form. The FRB recently deferred further consideration of the unadopted FC-0173. Ford Credit has offered no authority or logical basis for relying on unadopted agency proposals, particularly where the agency has precluded reliance.

2. Ford Credit argues that a ruling for the respondents on the merits should be given only "prospective" application, except as to the two respondents in this case. Presented in this posture, there is no case or controversy as to the issue of nonretroactive application of the decision. The express concession that the respondents should recover damages, regardless of the scope of application of the decision, destroys any adversarial relationship on this issue. Ford Credit seeks only an advisory opinion.

3. Even if this Court finds that a case or controversy exists, Ford Credit's attempt to apply the rule of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), is inappropriate. Where Congress mandates liability and carves out specific exceptions grounded in reliance and equitable considerations, resort to *Chevron* analysis is unnecessary and improper. In TILA Congress has set explicit damage recovery amounts and balanced equitable and reliance factors through inclusion of ceilings on damage awards, a brief statute of limitations, and an affirmative defense for creditors based on good-faith reliance on Federal Reserve Board rulings. The congressional adjustments of equitable and reliance considerations pre-empt application of *Chevron* principles.

Should the Court analyze the prospective-only issue under *Chevron* Standards, Ford Credit has failed to meet the burdens necessary to obtain prospective-only application. A decision for respondents would not represent a new principle of law. The Act, Regulation Z, the Federal Reserve Board and numerous Court of Appeals rulings have consistently required the disclosure Ford Credit here seeks to avoid. Nor has Ford Credit demonstrated that a retroactive application of the rule in this case will retard operation of the rule of the Truth in Lending Act. Finally, a normal application of the decision in this case will not produce substantial inequitable results. The effects on creditors will be minimal. Few lawsuits are pending and creditors who have changed their contracts in light of four Circuit Courts of Appeals rulings will, as a result of the Act's one-year limitations period, experience little or no additional exposure to liability.

ARGUMENT

I. Ford Credit Retained a Security Interest in Required Physical Damage Insurance Premiums That Must Be Disclosed Under The Act and Regulation

A. THE ACT AND REGULATION Z REQUIRE DISCLOSURE OF ANY SECURITY INTEREST.

Under TILA and Regulation Z, credit terms must be disclosed clearly, conspicuously and in meaningful sequence on

the front side of a contract. 15 U.S.C. §1631; 12 C.F.R. §226.8(a). One of the credit terms which must be so disclosed is "*any security interest* held or to be retained or acquired by the creditor in connection with the extension of credit and a clear identification of the property to which the security interest relates." 15 U.S.C. §1638(a)(10) (emphasis added). *See also* 12 C.F.R. §226.8(b)(5) (Ford Brief at 2).

There are no exceptions in the statute or regulation to the requirement to disclose "any security interest." Where the word "any" is used, it is inappropriate to read a limiting construction into the statute. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980); *Shea* v. *Vialpando*, 416 U.S. 251, 258 (1974) (". . . the words 'any expenses' . . . mean . . . 'all actual expenses.' ").

Ford Credit attempts to ignore the plain language of the Act and the Regulation and to distinguish between what it calls "the real 'security,' " (*i.e.*, second mortgages on consumers' houses and "the financed automobile,") and all other security interests. The sole basis for the distinction is a statement by Congressman Cahill that the "primary reason for disclosure of security interests was the 'secondary mortgage scheme.' " 114 Cong.Rec. 1611 (1968). A legislator's generalized statement concerning a "primary" function of a bill does not preclude other functions, including those specified by the statute on its face.[4] Ford Credit tries to temper the absurdity of the result of its argument (that only second mortgages need be disclosed) by conceding the need also to disclose the security interest in the item purchased. To achieve consistency with its over reliance on Congressman Cahill's general statement, Ford Credit then asserts that "the automobile purchased by the Buyers is analogous to a home . . ." Ford Brief at 13. Under the most cursory analysis the analogy falls apart.

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[4] *See, S & E Contractors* v. *United States*, 406 U.S. 1, 13 n.9 (1972): "In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of proposed laws." Congressman Cahill's statement was not a precise analysis of the amendment.

In addition, if 15 U.S.C. §1638(a)(10) were meant to be limited to only "essential" security interests or second mortgages, it would have been drafted in that manner. In TILA, for example, there is a three day right of contract rescission, but only in those transactions in which a security interest is taken in the consumer's dwelling. 15 U.S.C. §1635. In contrast, the plain language of 15 U.S.C. §1638(a)(10) is not limited to a particular security interest; it requires disclosure of "any security interest . . ." The starting point in construing a statute is the language of the statute itself. *Southeastern Community College* v. *Davis,* 442 U.S. 397, 405 (1979). "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . ." *Caminetti* v. *United States,* 242 U.S. 470, 475 (1917). *See also Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 184 n.29. (1978) and cases cited therein.[5]

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[5] Ford Credit's other attempt to avoid the plain language of the statute and regulation constructs an erroneous implication from 15 U.S.C. §1605(c). Under that provision charges for required physical damage insurance purchased in the contract must be included in the finance charge, unless there is a written disclosure stating the cost, and notice that the insurance may be purchased through a person of the consumer's choice. Ford Credit argues from this provision that there was no legislative intent to require disclosure of security interests in the premiums. Brief at 10. Its only support for this position is *Shanks* v. *Greenbriar Dodge, Inc.,* No. 75-1154A (N.D. Ga. 1976), which was reversed at 577 F.2d 296 (5th Cir. 1978). The purpose of 15 U.S.C. §1605(c), requiring inclusion of the cost of credit and physical damage insurance premiums in the finance charge, was to make certain that all creditors used the same method in computing finance charges and that the creditors did not disclose a low annual percentage rate while earning a higher rate through additional fees. H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967) *reprinted* in [1968] U.S. Code Cong. & Ad. News 1962, 1970. The security interest disclosure used different language in a separate provision for a distinct purpose. 15 U.S.C. §1638(a)(10). There is no inconsistency in the separate disclosures. It is axiomatic that all parts of an act, if possible, are to be given effect. *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 261 (1975). Even when the insurance charges must be included in the finance charge, if there is a security interest retained in them it must be disclosed.

Ford Credit also suggests that there can be no security interest in returned premiums because "the property interests in the policy are at least joint" between the creditor and debtor. Ford Brief, 13. The same situation exists, however, with respect to the goods purchased under the contract. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 604 (1974). Ford Credit's argument is a concession that there is a security interest because its claim to a "joint" property interest in the returned premiums exists solely by dint of the fact that it has taken a security interest in them.

Ford Credit's position in this case is also inconsistent with the federal regulation and numerous pronouncements of the Federal Reserve Board (hereafter "FRB" or the "Board") that require the disclosure of security interests not only in the item purchased and the consumer's home, but in any property, including returned insurance premiums. *See* 12 C.F.R. §226.2(gg) (extensive list of security interests); FRB Public Information Letter No. 377 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶30,555 (July 22, 1970) (security interest in returned insurance premiums). *See also* 12 C.F.R. §226.8(b)(5) (after-acquired property); FRB Official Interpretation, 12 C.F.R. §226.202 (1969) (confession of judgment clause); FRB Public Information Letter No. 827 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,149 (August 14, 1974) (pledged savings account balance); and FRB Public Information Letter No. 846 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,169 (October 9, 1974) (pledged shares in credit union account).

B. FORD CREDIT'S CLAIM TO RETURNED INSURANCE PREMIUMS IS A SECURITY INTEREST BECAUSE IT IS AN INTEREST IN PROPERTY WHICH SECURES PAYMENT OR PERFORMANCE OF AN OBLIGATION.

Ford Credit's contract includes, on its reverse side, a clause assigning to itself any returned physical damage insurance premiums. Contract, ¶17. The scope and impact of the clause is extremely broad. It applies to refunds of such insurance

purchased from the auto dealer or purchased independently by the consumer prior to, coincident with, or subsequent to the auto sale. It also authorizes Ford Credit to obtain the returned premiums whether the insurance is cancelled by Ford Credit, the buyer or the insurance company. The clause reserves use of such monies, which would otherwise be payable to the buyer, exclusively to Ford Credit.

Upon exercise of the clause and receipt of the funds, Ford Credit must apply the refunded monies toward the payment of the consumer's debt or replacement of the automobile. Contract, ¶ 17.[6] The clause is most commonly invoked upon repossession, when the creditor cancels the insurance and applies the returned premiums to the outstanding debt in the same manner as the proceeds of other secured property.

Regulation Z defines a security interest, for purposes of TILA disclosures:

> *"Security interest" and "security" means any interest in property which secures payment or performance of an obligation.* The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's and other similar liens, vendor's

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[6] Ford Credit's argument is in great part based on mischaracterization of its own contract. The premium refund clause serves as additional security for Ford Credit and not, as suggested by Ford Credit (Brief at 4), as a means to provide uninterrupted insurance. Paragraph 17 of the contract specifies that returned premiums must be used either (1) toward replacement of the "Property," defined on the contract's front page as the vehicle, or (2) toward the underlying indebtedness. Contrary to Ford Credit's assertion, the clause is not needed for protection from a risk of uninsured collateral; other provisions of the contract assure the continued existence of physical damage insurance coverage. Paragraph 17 authorizes Ford Credit to obtain replacement insurance if the necessity arises and to be reimbursed by the buyer for the expenditure. Paragraph 18 permits Ford Credit to accelerate the unpaid balance and to repossess the auto if the buyer allows the insurance to lapse.

> liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation. 12 C.F.R. §226.2(gg) (emphasis supplied).

Regulation Z thus establishes a two-pronged test for determining whether a security interest has been created: (1) "any interest in property which (2) secures payment or performance of an obligation." *Elzea* v. *National Bank of Georgia,* 570 F.2d 1248, 1249 (5th Cir. 1978). Ford Credit's clause meets both parts of the definition.[7]

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[7] Although Ford Credit has not advanced the argument, its *Amici* contend that state law, rather than the Act and 12 C.F.R. §226.2(gg), determines whether a TILA security interest exists. *Amici* Brief at 17-21. *Amici* rely on, but misconstrue, FRB Public Information Letter No. 1263 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,736 (November 23, 1977). This Letter indicates that state law may be one factor in assessing whether some creditors' interests are TILA security interests. Thus, if state law creates substantive rights that meet the Regulation Z definition of a security interest, such an interest must also be disclosed. The Letter looks to the substantive rights created by state law, the contract or otherwise, not to the label applied by the state law or by the contract. Regulation Z looks to the interest retained and classifies it for disclosure purposes. The court below analyzed Letter 1263 as follows:

> . . . state law can indicate whether a creditor possesses an interest in property securing performance of an obligation; if such an interest is found to exist, federal law defines it as a security interest. A creditor's substantive rights are still governed by state law; federal law merely classifies those rights for disclosure purposes. (J.A. 49) (citations omitted).

Accord: Souife v. *First National Bank of Commerce,* 628 F.2d 480, 483 (5th Cir. 1980); *Hernandez* v. *O'Neal Motors,* 480 F.Supp. 491, 494 (D. N.M. 1979), *rev'd on other grounds,* No. 79-2322 (10th Cir., June 24, 1980). *See also Travis* v. *Trust Co. Bank,* 621 F.2d 148, 150 (5th Cir. 1980); *Elzea* v. *National Bank of Georgia,* 570 F.2d 1248, 1248-50 (5th Cir. 1978); *Edmondson* v. *Allen-Russell Ford, Inc.,* 577 F.2d 291, 293-94 (5th Cir. 1978).

In this case, since Ford Credit's retained interest under the contract meets the Regulation Z definition, and the retention of that in-

Ford Credit's claim on returned insurance premiums is an interest in property. While Ford Credit claims it is an "incidental interest in property" (Brief at 9), it has already claimed a "joint" — i.e., not incidental — interest. If Ford credit is arguing that the property is "incidental," that is not true. The security interest represents a claim on hundreds of dollars, depending on the timing of the cancellation. If an insurance policy with a $400 annual premium is cancelled shortly after payment of the premium, the refund will approach $400. Contrary to Ford Credit's assertion, Ford Brief at 16, n.17, unearned premiums will always be recoverable, except in a small number of cases where the repossession happens to coincide with the end of the term of the insurance. This security is particularly advantageous to creditors in automobile

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terest is not barred by state law, the label applied by state law need not be considered. To the extent state law is pertinent, however, Ford Credit's claim to returned insurance premiums is a security interest under Illinois law. A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation." Ill. Rev. Stat. ch. 26, §1-201(37). Security interests may be created by "assignment." Ill. Rev. Stat. ch. 26, §9-102(2). The Illinois Commercial Code recognizes that retained interests in insurance are security interests and regulates the perfection and exercise of some, but not all, security interests as defined in §1-201(37). Ill. Rev. Stat. ch. 26, §9-101 *et seq.* It specifically enumerates security interests that are not subject to Article 9 provisions on perfection and exercise. Included in this enumeration is "an interest or claim in or under a policy of insurance, except as provided with respect to proceeds (§9-306) and priorities in proceeds (§9-312)." Ill. Rev. Stat. ch. 26, §§9-306, 312. If retained interests and claims in insurance were not security interests, they would not have been required to be specifically excluded from the technical provisions of Article 9. The only authority cited by *Amici* that retained interests in insurance are not security interests under Ilinois law is an order of the district court in this action that the court withdrew seventeen days later, declaring its prior conclusions "erroneous." (J.A. 19). The Illinois definition of security interest, as set forth in Ill. Rev. Stat. ch. 26, §1-201(37), is the same functional definition as contained in Regulation Z.

credit transactions, since the repossessed vehicle frequently will not generate sufficient proceeds to satisfy the outstanding debt.[8] Returned premiums are an attractive form of secured property in that they may be expeditiously obtained, with virtually no expense to the creditor. The insurance company forwards the premiums on Ford Credit's request. The security interest in them is "a valuable economic right" to Ford Credit. *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291, 294 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979). (*See also* section I.D., *infra*).

Ford Credit concedes that its retention of an interest in returned insurance premiums constitutes an interest in property, but characterizes it as "incidental".[9] The characterization of the interest does not control. *Valencia* v. *Anderson Bros. Ford*, (J.A. 49). The first test of a Regulation Z security interest is satisfied by "any interest in property . . ." 12 C.F.R. §226.2(gg).

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[8] The proceeds from the vehicle are insufficient because of the high mark-up on the original sale, rapid depreciation, high finance charges, and the sale of the repossessed automobile at wholesale rather than retail. *See* Federal Trade Commission, Proposed Trade Regulation Rule: Credit Practices, 16 C.F.R. Par. 444, Public Record 215-42, August 1978, at 205-23. Moreover, some creditors manipulate the proceeds of all secured property to assure that no surplus will be realized. In the past Ford Credit arranged to resell repossessed automobiles so that the proceeds from all secured property would be inadequate to meet the debts. *See F.T.C.* v. *Ford Motor Credit Company*, F.T.C. Docket No. 9073 (1978) [1969-1979 Transfer Binder] Trade Reg. Rep. (CCH) 12th Ed. ¶21,536. Ford Credit was required to pay its past customers approximately two million dollars.

[9] "The fact that a particular security interest is small compared to the object of the loan agreement does not change the nature of the interest which the creditor has in the security. The relative size of the security interest given is usually a matter left to negotiation between the parties." *Luczak* v. *General Motors Acceptance Corp.*, 494 F.Supp. 210, 213 n.3 (W.D. N.Y. 1980). Security interests are cumulative and the security interest in insurance premiums is important for its incremental value and ease of enforcement.

> It is not seriously disputed that the assignment of unearned insurance premiums confers on the creditor an interest in property. Even defendants refer to the assignment as an "incidental interest in property." Brief of Appellants at 8. Whether incidental or not, we agree with the Fifth Circuit that such an assignment is an interest in property. *Valencia* v. *Anderson Brothers Ford* (J.A. 49).

The second component of the Regulation Z definition of a security interest is stated in the disjunctive: "any interest in property *which secures payment or performance of an obligation.*" 12 C.F.R. §226.2(gg) (emphasis supplied). Ford Credit's claim on returned insurance premiums secures both payment *and* performance of an obligation.

Paragraph 17 of the contract expressly authorizes Ford Credit to apply refunded insurance premiums toward "payment of the indebtedness." The clause thus provides security for the payment of the consumer's credit obligation. This "places the assignment squarely within the definition of security interest under Regulation Z." *Murphy* v. *Ford Motor Credit Co.*, 629 F.2d 556, 559 (8th Cir. 1980).[10] Furthermore, under Ford Credit's view, the purpose of the premium refund clause "is to assure the continued existence of the insurance on the vehicle during the life of the loan." Ford Brief at 4. Ford Credit thus admits that its interest in returned premiums also

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[10] The overwhelming weight of case law is in accord. *See Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278 (7th Cir. 1980); *Souife* v. *First National Bank of Commerce*, 628 F.2d 480 (5th Cir. 1980); *Edmondson* v. *Allen-Russell Ford, Inc. and Ford Motor Credit Co.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied* 441 U.S. 951 (1979); *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F. 2d 437 (3rd Cir. 1977); *Luczak* v. *General Motors Acceptance Corp.*, 494 F.Supp. 210 (W.D. N.Y. 1980); *Ferguson* v. *Centran Bank of Akron*, CCH Cons. Cred. Guide ¶97,292 (D. Ohio 1980); and *Hagler* v. *Ford Motor Credit Co.*, 381 So.2d 80 (Ala. App. 1980). Ford Credit cites five contrary cases. Brief at 24, n.9. Two of these cases, however, *Mullen* v. *North Pacific Bank*, 610 P.2d 949 (Wash. App. 1980), and *Ector* v. *Southern Discount Co.*, No. C78-899A (N.D. Ga. 1980) (Ford Add. 11-17), do not concern returned insurance premiums. A third, *Rounds* v. *Community National Bank*, 454 F.Supp. 883 (S.D. Ill. 1978), was reversed in effect by the decision below in this case.

secures performance of the buyer's contractual obligation to maintain insurance coverage, thereby satisfying the alternative requirement in the second prong of the Regulation Z definition of "security interest". *Valencia* v. *Anderson Bros. Ford,* (J.A. 49 n.10); *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291, 294 (5th Cir. 1978), *cert. denied,* 441 U.S. 951 (1979).

In an attempt to evade the clear embrace of the Regulation Z definition, Ford Credit argues that 12 C.F.R. §226.2(gg) does not "expressly cover" the interest in returned premiums and focuses on the list of examples set out in the definition. Ford Credit asserts that the examples represent security interests of a different nature than its interest in returned premiums, and asserts the principle of *ejusdem generis.*

Ejusdem generis is inapplicable where the context manifests a contrary intent. *Gooch* v. *United States,* 297 U.S. 124, 128 (1936). While Ford Credit has tracked the list of examples in 12 C.F.R. §226.2(gg) (Brief at 8), it has omitted the crucial phrase which precedes the list: "[t]he terms include, but are not limited to. . . ." Where there is an introductory clause such as "including, but not limited to . . .," *ejusdem generis* does not apply because such language is used to avoid the application of the rule. *Ramirez Leal & Co.* v. *City Demonstration Agency,* 549 F.2d 97, 104 (9th Cir. 1976), *pet. for rehearing denied,* 549 F.2d 156 (9th Cir. 1977); *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 988-89 (5th Cir. 1976). *See also Harrison* v. *PPG Industries, Inc.* 446 U.S. 578, 588-589 (1980).[11]

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[11] Ford Credit's conclusion that the examples in the definition are different in kind from the security interest in returned premiums is unsupported by any analysis or authority, and is incorrect. The list includes "consensual . . . liens whether or not recorded . . .," 12 C.F.R. §226.2(gg), an example parallel to the interest in controversy. As a result, even if *ejusdem generis* were applied, it would not exclude returned premiums from the broad definition of security interest. *See Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980).

The Board recognized the all-inclusive nature of the Act's requirement that "any" security interest held must be disclosed when it broadly defined "security interest" in the regulation. The Act and Regulation Z thus require disclosure of Ford Credit's security interest in returned insurance premiums.

C. SINCE 1970 FRB PUBLIC INFORMATION LETTER NO. 377 HAS REQUIRED THE DISCLOSURE OF A CREDITOR'S CLAIM ON REFUNDED INSURANCE PREMIUMS AS A *TILA* SECURITY INTEREST; A RECENT BOARD STATEMENT ASSUMES THE SAME REQUIREMENT

One year after the effective date of TILA, the Board issued a Public Information Letter which required disclosure of a creditor's retention of an interest in returned insurance premiums as a TILA security interest. FRB Public Information Letter No. 377, [1969-1977 Transfer Binder] Cons. Cred. Guide (CCH), ¶30,555 (July 22, 1970).[12] The interpretation relied on three key factors dictating disclosure, all of which are present in this case. First, both involve a creditor gaining an exclusive interest in returned insurance premiums which

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[12] The FRB responded to creditor's counsel as follows: "As we understand the proposed plan, your client proposes to place literature in its loan offices concerning insurance to be sold by a company unrelated to your client. Applications for a single premium lifetime accidental death and dismemberment policy are available in each [loan] office and if a customer desires to purchase such a policy with the proceeds of his loan, a check will be sent directly to the company from your client [the loan company] in payment of the premium. While your client will not require the purchase of this insurance and the proceeds of the policy would in no circumstances be used to pay any portion of the unpaid balance of the loan, your client would be designated as owner of the policy during the term of the loan. *In the event of the customer's default, your client would have the right to cancel the policy and apply any premium refund to the unpaid balance of the loan.* Under the circumstances, *we think it would be appropriate to disclose the loan company's ownership of the policy as a type of 'security interest' under [12 C.F.R.] Section 226.8(b)(5) . . ..*" (emphasis added).

would otherwise be payable to the consumer. Second, the creditor in both situations is empowered to cancel the insurance upon default. Third, the creditor is specifically authorized to apply all refunded premiums to the unpaid balance of the credit obligation, thus discharging in full or in part the debt and providing additional security to the creditor.[13] This Public Information Letter is entitled to substantial deference. *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 977 (5th Cir. 1974).

The FRB's consistent understanding that security interests in insurance proceeds must be disclosed under the Act and Regulation Z is further evident in a recent statement regarding proposed new Regulations to implement the TILA

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[13] Ford Credit's *Amici* try unsuccessfully to distinguish this interpretation. (Brief at 18). First, the *Amici* argue that the Letter concerns a set of facts where "a credit transaction [is] undertaken for the express purpose of acquiring insurance." The Letter, however, does not support this statement; it merely indicates that insurance would be purchased "with the proceeds" of the loan, but does not suggest the purpose of the loan or that the entire proceeds of the loan would be so expended. In any event such as transaction is substantially similar to those instances where the property damage insurance is included in and financed by the same contract used for the purchase of the automobile. This arrangement is so common in automobile financing that the Ford Credit form contract has specific provisions and charge itemization blanks for the financing of the insurance. (J.A. at 67). *Amici* also claim that the Letter states that the insurance premiums would be "the only collateral" in the credit transaction. The Letter contains no such statement. The final distinction urged by the *Amici* is that the creditor in the Letter gained an interest in the premiums via a contractual designation as "owner of the policy." While this distinction is at least accurate, it is without substance. It is not the creditor's appellation which controls the question of whether a security interest has been created; it is the bundle of rights which must be examined instead. *See Gilbert* v. *Wood Acceptance Co.*, 486 F.2d 627, 632 (7th Cir. 1973); and *Lewis* v. *Walker Thomas Furniture Co., Inc.*, 416 F.Supp. 514, 516 (D. D.C. 1976) ("creditors must not be allowed to decide for themselves what language is sufficient to satisfy the requirements of the law.").

Simplification and Reform Act, effective in 1982 (hereafter "Simplification Act"), Pub.L. 96-221, Title VI, 94 Stat. 168. In proposing the new Regulation Z, the FRB inquired of the public: "Should a *security interest be defined more narrowly than under the current regulation, to exclude* a number of incidental property interests, such as accessions, accessories and *interests in insurance and unearned insurance proceeds?*" Federal Reserve Board Press Release, Nov. 28, 1980, (Add. 1) (emphasis supplied). This statement concerning the current regulation comports with the regulation's plain meaning.

D. THE DISCLOSURE OF A SECURITY INTEREST IN REQUIRED INSURANCE IS SIGNIFICANT AND MEANINGFUL TO CONSUMERS, THEREBY PROMOTING THE PURPOSES OF *TILA*

1. The main thrust of Ford Credit's argument is that even though the retained interest in required insurance is a security interest, it need not be disclosed because it "is of virtually no consequence to the debtor," and its disclosure would not be understood by consumers or used for comparison shopping. Ford Brief, at 18.[14] However, "[i]f the security interest was important enough for [Ford Credit] to acquire, it was important enough to disclose." *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291, 294 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979).

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[14] Since the statue and regulation require disclosure, Ford Credit is inappropriately second-guessing the judgment of Congress and the FRB. Ford Credit's argument is that the declaration of purpose provision of the statue controls the provision regarding disclosure of "any security interest." A preamble does not control the plain language of provisions in the body of the statue when it would lead to a construction inconsistent with the plain language. *Price* v. *Forest*, 173 U.S. 410, 427 (1899). All parts of an act, if possible, are to be given effect. *F.A.A. Administrator* v. *Robertson*, 422 U.S. 255, 261 (1975). Moreover, as demonstrated in the text, disclosure of the security interest at issue fulfills the purposes in the preamble of uniform disclosure and "avoid[ing] the uninformed use of credit." 15 U.S.C. §1601(a).

The security interest in required insurance is substantial from the consumer's point of view.[15] In the case at bar the annual premium was $215. In *Hernandez* v. *O'Neal Motors, Inc.*, No. 79-2322 (10th Cir., June 24, 1980), *petition for cert. filed sub nom. James* v. *Ford Motor Credit Co.*, ____ U.S. ____, the physical damage insurance premium in one of the consolidated cases was $288.40 for six months and Ford Credit financed the automobile over a four year period. *Hernandez*, Record on Appeal, vol. viii at 247.

Physical damage insurance is not sold for terms of more than one year. It is common for automobiles to be financed over periods of three or four years. Because the insurance must be periodically repurchased, the value of this security interest is replenished with each subsequent repurchase. In the *Hernandez* case, for example, the security interest in insurance premiums is as valuable to Ford Credit in the 43rd month of the contract as it was during the first month; in contrast, the value of the automobile as a security interest constantly declines.

A properly disclosed security interest in returned insurance premiums would be understood by consumers and used for comparison shopping. The concept of a security interest is understood by consumers to allow the creditor, without notice, to take the debtor's money or property. Automobile purchasers know the creditor can take back the car if pay-

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[15] Congressional history belies Ford Credit's claim that the interest in returned insurance premiums is insignificant and was of no concern to Congress. In the year preceding passage of TILA there were extensive hearings concerning abuses and hidden profits in the consumer credit insurance industry. *Hearings before the Subcommittee on Antitrust and Monopoly, Senate Judiciary Committee*, 90th Cong. 1st Sess. (1967). Some 3500 pages of testimony and exhibits were presented at these proceedings. Undisclosed retention of returned insurance premiums and resulting abuses were explicitly addressed by witnesses in the 3500 pages of the hearings. *See, e.g., id.* at 27. Statement of James H. Hunt, Vermont Commissioner of Banking and Insurance.

ments are not made. Consumers who obtain loans at a finance company know the security interest in household goods means the creditor can take those goods if there is a default in payments. Similarly, consumers understand the effect of a security interest in other property such as insurance premiums when that fact is disclosed. In addition unless the creditor's security interest in insurance is meaningfully disclosed consumers will not recognize those instances where the refunded premiums are not properly credited to the outstanding balance at default. This result also is plainly inconsistent with the Act's goal of helping consumers "avoid the uninformed use of credit." 15 U.S.C. §1601.

2. Prior to the enactment of TILA, each creditor disclosed as much or as little as it deemed useful to itself, in the terminology of its choice. Understanding the provisions, comparison credit shopping and the informed use of credit were difficult, if not impossible tasks.

TILA was meant to effect a major change in credit practices. Credit information is required to be set forth in clear and conspicuous fashion. It mandates uniform terminology and disclosure in meaningful sequence on the front side of the contract or disclosure sheet. 12 C.F.R. §§226.6(a) and 226.8(a). It standardizes credit disclosures, thereby improving the ability of a consumer to make intelligent choices.[16] There has been an increasing understanding among consumers of the meaning of terms standardized by TILA.[17] *See* Annual Report To

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[16] TILA standardized disclosure through the use of uniform terms and technical methods of computing credit rates. Ford Credit argues that this security interest does not have to be disclosed because it is "technical." Labelling the disclosure in this case as technical does not advance Ford Credit's argument; the entire TILA has been described by this Court as "highly technical." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

[17] Calling its security interest in returned premiums an "assignment" is an "attempt to characterize . . . [the] transactions so as to fall one step outside whatever boundary Congress attempted to establish . . . [in TILA]." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973).

Congress On Truth in Lending For The Year 1977, Board of Governors, CCH Cons. Credit Guide Issue No. 484 Part II, January 10, 1978.

Ford Credit's retention of a security interest in returned insurance premiums uses convoluted "assignment" language on the reverse side of the contract. It is an anachronism exemplifying the problems Congress set out to address in 1968.

Creditors who have routinely disclosed their security interest in returned insurance premiums have done so in a concise yet informative manner. In *Bulger* v. *Thorpe Credit, Inc.*, 609 F.2d 1255, 1257 (7th Cir. 1979), the creditor merely appended the words "and all unearned credit insurance premiums" to its security interest disclosure. The Third Circuit noted that the "insurance security interest could have been identified clearly by a phrase such as 'this loan is secured by any insurance required or purchased' . . ." *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F.2d 437, 442 n.17 (3rd Cir. 1977). *See also Luczak* v. *General Motors Acceptance Corporation*, 494 F.Supp. 210, 214 (W.D. N.Y. 1980). Moreover, in response to the numerous decisions on this issue, Ford Credit has altered its contract to disclose the security interest on the face of the contract by inserting a mere five words:

> Security Interest: The Buyer gives the Creditor a security interest . . . in the vehicle . . . *and in all insurance charges* . . .

Ford Credit Illinois Automobile Retail Installment Contract, ¶11, (Add. 2) (emphasis supplied). In so doing the "assignment" clause was dropped from the reverse side and the overall length of the contract was actually decreased. Ford Credit's "information overload" argument is thus specious. Rather than frustrating the purpose of TILA, the disclosure has resulted in a shorter credit contract which explains clearly to consumers that the creditor is reserving a security interest in insurance premiums.

By burying its security interest in refunded premiums on the former contract's reverse side in a mist of legalese, Ford Credit made it nearly impossible for consumers to be aware of this security interest. This misled consumers who properly relied on the disclosures on the front and the minimized significance, under TILA, of the reverse side of the contract. *See Luczak* 484 F.Supp. at 214.

3. In *Mourning* v. *Family Publications Service,* 411 U.S. 356, 377 (1973), this Court described the guiding rationale of TILA:

> The Truth in Lending Act reflects a transition in congressional policy from a philosophy of let the buyer beware to one of let the seller disclose. By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought 'to . . . avoid the uninformed use of credit.' [citations omitted].[18]

The recent holding in *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555 (1980), also supports requiring disclosure of a creditor's security interest in premium refunds. The TILA goal of meaningful disclosure is "a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [information overload].' " *Id.* at 568. The creditor in *Milhollin* had used a form which properly disclosed prepayment rebate practices, but did not disclose acceleration rebate practices. The Court held that acceleration rebate practices were not required to be disclosed unless they diverged from the already disclosed prepayment rebate practices. The Court adopted the reasoning of the Federal Reserve Board that the two rebates were not so analytically distinct as to require inde-

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[18] Ford Credit's suggestion (Brief 30-31) that the damage provisions of the Act merit strict construction in favor of the creditor contradicts this Court's ruling in *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. at 375-76. In light of its underlying remedial purposes, the Act is to be given a liberal construction to effectuate its goal of consumer protection. *Mirabal* v. *General Motors Acceptance Corp.,* 537 F.2d 871, 878 n.12 (7th Cir. 1976), and cases cited therein.

pendent disclosure. Where acceleration practices mirrored disclosed prepayment procedures, requiring a duplicative disclosure would cause "information overload." *Id.* at 562.

In the instant case however, the disclosure of Ford Credit's security interest in premium refunds would not duplicate any other credit disclosures. Instead, it would be the only disclosure advising the consumer that his insurance premium refunds were security for the creditor. Requiring the disclosure "rationally accommodates the conflicting demands for completeness and simplicity." *Ford Motor Credit Company* v. *Milhollin,* 444 U.S. at 569. As suggested by the courts and belatedly adopted by Ford Credit (*see* p. 21, *supra*), the straightforward disclosure of the security interest in insurance is shorter, clearer and more meaningful to consumers than the long, vague, legalistic and hidden assignment provision in question.

II. Ford Credit's Reliance on Statutory Amendments Intended to Apply to Future Transactions is Misplaced

In 1980, Congress enacted substantial amendments to the TILA, Pub.L. No. 96-221, Title VI, 94 Stat. 168 (1980). The law, commonly known as the Truth in Lending Simplification Act, was signed on March 31, 1980. No provision of the Act had retroactive application. One provision, Pub.L. No. 96-221, §608, not relevant to this case, took effect immediately. The remainder of the Simplification Act is not effective until April 1, 1982, except that the Federal Reserve Board must issue regulations by April 1, 1981, and creditors have the option of complying with such regulations upon adoption. Pub.L. No. 96-221, §625.[19]

Ford Credit argues that this case should be decided in accordance with the Simplification Act, which has not yet taken

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[19] As of this date, the Board's second draft of the omnibus implementing regulations has been published for public comment, 45 Fed.Reg. 80648 (December 5, 1980), but the final regulations have not been adopted.

effect, rather than under the law in effect when the contract was signed. This argument is without merit. It has been analyzed and rejected in *Murphy* v. *Ford Motor Credit,* 629 F.2d 556, 560 (8th Cir. 1980), *Souife* v. *First National Bank,* 628 F.2d 480, 484 (5th Cir. 1980), and *Luczak* v. *General Motors Acceptance Corp.,* 494 F.Supp. 210, 213, n.2 (W.D. N.Y. 1980).

A. CONGRESS INTENDED THE SIMPLIFICATION ACT TO HAVE ONLY PROSPECTIVE APPLICATION.

Congress could have, but did not make the Simplification Act retroactive in effect. In 1974, Congress amended the TILA to limit creditor liability in class actions, and to provide a defense from liability for compliance with a regulation or interpretation of the Board. These and other amendments were specifically made applicable to pending litigation which had not reached final judgment. *See* 15 U.S.C. §1640, Pub.L. No. 93-495, §408(e)(1974).[20] Congress' failure to include a similar provision in the Simplification Act establishes that the Act does not apply to prior consumer transactions and to litigation concerning such contracts. In addition, since the Simplification Act does not extinguish liability for TILA violations occurring prior to its effective date, by virtue of 1 U.S.C. §109 Ford Credit's liability is not altered by the enactment of the amendments.[21] *See DeLaRama S.S. Co.* v. *United States,* 344 U.S. 386 (1953).

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[20] A second group of 1974 amendments were effective immediately upon enactment, and a third group were not effective until one year after enactment. Congress is thus well aware that in amending the TILA it can make amendments effective at different times.

[21] 1 U.S.C. §109 provides that an amendment or repeal of a prior statute:

> shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

B. THE SIMPLIFICATION ACT CHANGES THE PRIOR LAW AND THUS DOES NOT INTERPRET THE INTENT OF CONGRESS IN ADOPTING THE *TILA* IN 1968.

Among the prospective changes made by the Simplification Act is a change in the requirements regarding disclosures of security interests. Instead of requiring a disclosure of "any security interest held or retained," 15 U.S.C. §1638(a)(10), the amendment will require disclosure of "a security interest" in

> (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type. Pub.L. No. 96-221, §614.[22]

When Congress changes a statute prospectively, there is no basis to assume, as Ford Credit does, that the requirements and intent of the prior law or the judicial applications thereof are intended to be altered for events occurring during the time the prior law was in effect. Thus, in *United States* v. *Plesha,* 352 U.S. 202, 208 (1957) this Court rejected the argument that the history of the 1942 amendments to a law was proper to use in construing the 1940 law: "if the legislative history . . . indicates anything, it is that Congress thought that it was changing the law by changing the language of the Act." *See also Souife* v. *First National Bank of Commerce,* 628 F.2d at 484-85. In this case Congress has simply altered the law prospectively. There is nothing in the statute or committee reports that purports to interpret the existing TILA.

The committee reports do express concern about the economic and policy results of the prior statute. Virtually all legislative changes are predicated on a claim of deficiencies in the statute being amended. But Congress knows well how to

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[22] This case does not present the issue of whether under the Simplification Act and its legislative history, the security interest in unearned physical damage insurance premiums will have to be disclosed. *See Souife* v. *First National Bank of Commerce,* 628 F.2d 480-484-85 (5th Cir. 1980). Ford Credit's assumption that there will be no disclosure requirement is, however, premature.

amend a law retroactively or how to state its belief that the courts have misinterpreted a statute. In this instance the committee reports notably fail to do either. The portion of the Senate Report that Ford Credit cites (Ford Brief at 19) is immediately preceded by the statement that "the act could be substantially improved." S.Rep. No. 73, 96th Cong., 1st Sess. 2 (1979), *reprinted in* [1980] U.S. Code Cong. & Ad. News 878-79 (May, 1980 Supp.). Not a single word, phrase or sentence in the lengthy excerpts of the committee report quoted by Ford Credit (Ford Brief at 19-20) and in *James* v. *Ford Motor Credit Company,* No. 78-1806 (10th Cir. 1980) suggest an intent to construe the prior act.[23] Rather, the reports are permeated by an intent to change the statute, not reconstrue the original provisions. This is true of the security interest provisions as well, which is "*simplified* to *eliminate* the technical disclosure . . . [T]he Committee *intends this* [new] *provision* to require a listing [of only certain security interests]." S.Rep. No. 96-368, 96th Cong. 1st Sess. 30 (1979), *reprinted in* [1980] U.S. Code Cong. & Ad. News 834, 864 (May, 1980 Supp.) (emphasis added).

C. A STATEMENT BY SENATOR GARN IN 1980 DOES NOT REFLECT THE INTENT OF THE CONGRESS WHICH PASSED THE *TILA* IN 1968, WHEN SENATOR GARN WAS NOT IN CONGRESS.

There is one snippet of legislative history belatedly and incorrectly suggesting that the TILA phrase "any security interest" means something other than what the words mean, and that the 1980 Simplification Act amendment reflects Congress' intent in the 1968 Act. It is contained in a statement in-

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[23] Ford Credit (Ford Brief at 19) emphasizes that the court decisions on various TILA issues (not specifically the security interest cases) were described in the report as "highly technical." S.Rep. No. 73, 96th Cong., 1st Sess. 2 (1979), *supra.* The Act is, of course, "highly technical." *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 566 (1980). "Highly technical" decisions are not incorrect decisions, and the committee, addressing the cases directly, chose not to describe such decisions as incorrect interpretations of the TILA.

serted in the Congressional Record by Senator Garn during the debate on the Simplification Act. 125 Cong.Rec.S. 4990 (daily ed. May 1, 1979). Senator Garn's position thus contradicts the authoritative committee reports on the purpose of the Simplification Act.[24] Moreover, Senator Garn was not a member of Congress at the time the TILA was drafted and enacted in 1968.

This court has consistently held that the post-passage pronouncements of individual legislators, purporting to describe the meaning or intent of a previously enacted statute, have little if any weight in the judicial construction of the statute. *United States* v. *United Mineworkers of America,* 330 U.S. 258, 281-82 (1947) (noting also that some of the senators expressing opinions were not members of the Senate when the law was passed); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* ___ U.S. ___, 64 L.Ed.2d 766, 768 (1980); *Quern* v. *Mandley,* 436 U.S. 725, 736 n.10 (1978) (discounting post-passage observations by a single member of Congress); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 354 n.39 (1977); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974) (rejecting post-passage views of 36 Congressmen); *National Wood-Work Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612, 639 n.33 (1967) (discounting "the personal views of these legislators"); *United States* v. *Wise,* 370 U.S. 405 (1962).[25]

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[24] In addition to the reasons discussed in the text, *infra,* for rejecting the post-passage remark of a single legislator as a basis for construing a statute, additional cautions should operate here. Senator Garn was a member of the committee which did not present his view in its report. The logical conclusion is that either he expressed his position in committee and the committee rejected it, or he did not formulate his opinion until after the committee report was issued. Moreover, because Senator Garn's statement was written and inserted in the Congressional Record, rather than being made in an actual floor debate, it was not subject to normal discussion, much less to possible queries as to its inconsistency with the committee report.

[25] Ford Credit (Brief at 22) relies on a line of cases in which the Court used customary sources of construction, *i.e.,* language of the

Ford's contention that the Simplification Act interprets the TILA thus is based solely on the post-passage statement of a single senator who was not a member of Congress at the time TILA was enacted, and whose belated statement explains the purpose of the 1980 amendment in a manner at variance with the purpose enunciated by the committee. This can hardly support a finding that the Simplification Act interpreted the TILA or its security interest provisions.

III. An Unadopted Federal Reserve Board Interpretation Is Entitled to No Deference, Weight or Consideration by This Court

In September 1980, the Federal Reserve Board released Proposed Official Staff Interpretation FC-0173, 45 Fed.Reg.

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statute, committee reports, and agency interpretations, to construe prior legislation. None of these cases used a single remark by a single legislator. In *Red Lion* v. *Federal Communications Comission,* 395 U.S. 367, 381 (1969), a challenge to the FCC fairness doctrine was rejected because statutory amendments facially "ratified" a longstanding FCC interpretation of the prior act. In *National Labor Relations Board* v. *Bell Aerospace Company Division of Textron, Inc.,* 416 U.S. 267 (1974), the subsequent legislation re-enacted a statute with no pertinent change, in conjunction with a longstanding NLRB interpretation. *Id.* at 274, 276. Similarly, in *Seatrain Shipbuilding Corp.* v. *Shell Oil Company,* 444 U.S. 572 (1980) the agency had consistently interpreted the Act, and a committee report explaining a subsequent amendment to another provision of the Act stated specifically it did not mean to affect the prior provision and its interpretation. The subsequent history referred to in *Regents of University of California* v. *Bakke,* 438 U.S. 265, 349 (1978) (Justices Brennan, White, Marshall and Blackmun) involved the effect of a subsequent statute other than the one being construed, not a floor statement, and the later statute presented a problem of irreconcilability. Moreover, even when substantial subsequent legislative history specifically purports to construe prior legislative intent, this Court evaluates the weight to be given such statements with the "oft repeated warning that views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Commission, et al.* v. *GTE Sylvania, Inc., et al.,* ___ U.S. ___, 64 L.Ed.2d 766, 778 (1980).

63295 (Sept. 24, 1980) (Ford Brief at Add. 55), asking for comments on whether disclosure of security interests in returned premiums should not be required. The notice explicitly stated that, after comments, the proposed interpretation might be amended or withdrawn:

> (2) The letter is being issued as a proposal, rather than in final form, and interested persons are invited to submit relevant comments.
>
> (3) After comments are considered, this official staff interpretation may be amended, may be withdrawn or may remain unchanged.

Furthermore, the Board explicitly advised creditors in a mailing of November 24, 1980, that "This proposed interpretation may not be relied upon until final action is taken." Add. 3. Final action has never been taken, and on December 16, 1980, the Board deferred further consideration indefinitely. 45 Fed.Reg. 84074 (December 22, 1980), Ford Brief, Add. 58.

Ford Credit argues that this *proposal* represents the Board's position and is entitled to great weight. (Ford Brief at 18, 32-34, 40). Ford Credit has cited no authority and no logical basis for relying on unadopted agency proposals.

The Board properly noted that since the opinion was only proposed, it did not constitute legal authority. Ford Credit rejects the real opinion in the Board proposal — that its unadopted interpretation has no meaning. The Board is correct. If proposals are treated as anything more than what they are — lightning rods for public comment — the entire process of proposing rules and regulations for comment would be subverted. In many circumstances agencies would be reluctant to propose rules for comment; in others mere proposals would be pushed through in order to affect conduct or litigation without running the risks of actually adopting a rule after

public comment or scrutiny.[26] Alternatively, agencies would be required to frame proposals only as questions, foregoing the valuable comments adduced by specific proposed language and the implications or ambiguities identifiable in such language.

Thus, the Board itself has prohibited creditor reliance on the proposed interpretation. Despite the fact that no judgment has been made, Ford Credit relies extensively on what it heedlessly asserts is the "informed judgment of the Board and its staff." Ford Brief at 30.

The procedure followed in proposing FC-0173 was unusual for the Board, thereby further demonstrating the tentative nature of the proposed interpretation and the desire to hear arguments from creditors and consumers before taking final action. Official interpretations are initiated by a request from a creditor for an official interpretation of a specific section. Normally, the Board will respond to the request by issuing an official interpretation; members of the public may then request the opportunity for comment. *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 567, n.10 (1980). If the Board decides not to allow public comment, the interpretation stands without further action. If the Board decides to allow public comment, the interpretation is withdrawn and the period for comment announced.

A different procedure was followed with regard to FC-0173. The Board never issued an official interpretation. The only notice was a proposed official interpretation with an immediate request for public comment. The Board was thus not making a judgment; instead it requested additional views of interested parties in order to allow it, at a later date, to make an

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[26] In the David-and-Goliath context often inherent in the regulatory process, it is not uncommon that an interest group or corporation obtains at least a proposed rule, but the public comments act as a brake on administrative agency action. *Cf.* M. Asimow, "Public Participation in the Adopting of Interpretive Rules and Policy Statements," 75 Mich.L.Rev. 521-84 (1977); C. Koch, "Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy," 64 Geo.L.J. 1047-79 (1976).

informed judgment. Contrary to Ford Credit's argument, there is no statement or inference in *Milhollin* that *proposed* interpretations are entitled to any weight, particularly when the Board had prohibited creditor reliance and deviated from its normal procedure of simply issuing interpretations.

Even if proposed interpretation FC-0173 had been issued in final form, it would still be entitled to little or no deference under *Milhollin*. The question in *Milhollin* was whether the TILA required disclosure of an acceleration clause. The Court found that "the issue of acceleration disclosure is not governed by clear expression in the statute or regulation," and therefore deferred to the several consistent interpretations of the FRB. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 560 (1980). The case at bar presents a very different situation. Since the Act and Regulation Z expressly require disclosure of the security interest at issue (see section I.A., *supra*), it is unnecessary for this Court to look to the proposed interpretive rule. *See Milhollin, supra*, 444 U.S. at 560.

If proposed interpretation FC-0173 has been adopted, moreover, it would not control this case. The proposal does not conclude that the interest retained in insurance premiums is not a security interest — the determinative issue under TILA. Rather, it applies a test of "incidentalness," a criterion which directly contravenes the TILA statutory requirement that "any security interest" be disclosed, 15 U.S.C. §1638(a)(10). The proposal is not longstanding, not consistent with other FRB pronouncements, and not rational (see section I., *supra*). It therefore would not control. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980); *Skidmore* v. *Swift and Co.*, 323 U.S. 134 (1944); *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979); *General Electric* v. *Gilbert*, 429 U.S. 125, 141-143 (1976).[27]

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[27] Ford Credit's reliance on FC-0173 assumes a reading of *dictum* in *Milhollin* v. *Ford Motor Credit, supra*, under which traditional notions of the level of deference applied to legislative rulemaking pursuant to an explicit legislative delegation would be extended to

It would be illogical to give any weight to a proposed interpretation, as by its nature the proposal is subject to change. Proposed Interpretation FC-0173 is unadopted, and contradicts the express language of the Act, Regulation Z, and other FRB pronouncements.[28] As a consequence it should not affect this Court's resolution of this case.

IV. There Is No Case or Controversy as to Ford Credit's Request That This Court Not Apply Its Decision "Retroactively" to Litigants Other Than the Respondents in This Case

For Credit argues that a ruling for the respondents should "be given only prospective application *except as to the Buyers.*"

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the context of administrative interpretations of particular statutory language. *But see K. Davis, Administrative Law Treatise,* Vol. 2, §7:8 at 36-42 (2d ed. 1979), and *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944). This Court need not, of course, assess the correctness of Ford Credit's reading of *Milhollin* since FC-0173 was never adopted.

[28] In addition, proposed FC-0173 "recognizes that there are a number of Circuit Court decisions to the contrary." Interpretations that are primarily litigation-inspired are not entitled to great deference. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* ___ U.S. ___, 64 L.Ed.2d 766 (1980). Moreover, by its proposed interpretation, the Board has interpreted *Milhollin* to give it the authority to act as an ultimate court of review with power to reverse decision of the Circuit Courts of Appeal and even this Court. The Board's "*deferral* of final action" on December 15, 1980, "in light of the Supreme Court's grant of certiorari" in this case suggests that when this court affirms, the Board may be assuming the right to nullify the decision. Such an interpretation and use of *Milhollin* will increase and extend the time of litigation under TILA. Creditors may litigate any issue throughout the court system and if they win the issue is over. However, if the creditors lose, they may then take the issue to the Federal Reserve Board to reverse a court's decision, thus giving the creditors a second bite at the apple. In practice, the FRB opinions and interpretations are issued only at the request of creditors and not at the request of consumers. If a consumer believes that the Act has been violated, he will bring an action in court. This is the method established by Congress for consumer enforcement of the TILA. FRB interpretations and opinions, on the other hand, are used to protect creditors from liability.

Ford Brief at 35, 44 (emphasis supplied).[29] As Ford Credit presents the issue, it fails to present a case of controversy as required by Article III of the Constitution. Ford Credit's express concession that the respondents should recover damages regardless of a prospective application of the decision destroys any adversarial relationship on this issue.

The case or controversy requirement limits courts to "adjudication of actual disputes between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974).

> [F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them . . . *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

In certain unusual circumstances, this Court may give a ruling prospective application only. "Non-retroactivity" may bar application of a decision to all litigants, or to all except the one in the case being decided. In either situation, since the litigant in the case has an interest in asserting that he should benefit from the ruling, there is a case or controversy.[30] *See Linkletter*

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[29] Ford Credit took the same position in the Court of Appeals. J.A. 54. We would also note that Ford Credit incorrectly uses the term "prospective" to preclude liability on cases already filed or to be filed within the statute of limitations; such cases are, however, precisely those which this Court has frequently considered not barred by a prospective-only application. *See Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969): "[W]e will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." *See also Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1939). For purposes of this argument, however, respondents will use the terms in the manner Ford Credit does.

[30] Thus if Ford Credit had taken issue with the application of an affirmance to respondents, the Court would have had a live case or controversy, one possible resolution of which would have been to apply the decision "retroactively" to the respondents but not to others.

v. Walker, 381 U.S. 618, 622 n.3 (1965). *But see Stovall* v. *Denno,* 388 U.S. 293, 301 (1967).

In this case, as to the "non-retroactivity" issue, Ford Credit has asked the court for no relief that affects the respondents in any manner and for no alteration in the Judgment. There is therefore no adversarial relationship on this issue and no case or controversy.

In *Relford* v. *United States Disciplinary Commandant,* 401 U.S. 355, 369-70 (1971), this Court refused to reach the issue of retroactivity of a prior decision because, given the disposition of *Relford,* there was no controversy as to retroactivity and that issue would be "better resolved in other litigation." The Court cited *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945), which refused to decide an issue where there was no case or controversy, and dismissed the writ of certiorari.

In not contesting the respondents' recovery, Ford Credit has eliminated the crucial element of adverse interest. The request for prospective application — in the posture presented to this Court — is nothing more than a request for an advisory opinion:

> [S]uch suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' *Flast* v. *Cohen,* 392 U.S. 83, 96-97 (1968) (citation omitted).

Ford Credit desires an advisory opinion limiting its potential exposure in other actions. Respondents here are not parties in any of the other lawsuits to which Ford Credit refers. Other pending litigation cannot create a case or controversy where it is absent in the case at bar. *Local No. 8-6* v. *Missouri,* 361 U.S. 363, 370 (1960); *American Book Co.* v. *Kansas,* 193 U.S. 49, 52 (1904). Justiciability is determined not by the circumstances in other cases, but "by the conditions in the case now before . . ." the Court. *Id.*

V. In the Truth in Lending Act Congress Has Made Specific Provision For Limits on Liability For Violations. This Legislation Pre-empts Any Analysis That Would Otherwise be Made Under *Chevron Oil Co.* v. *Huson.*

Even if this Court determines that there is a case or controversy, Ford Credit is incorrect in asserting that the Court should look to the test set forth in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), to determine the scope of applicability of the decision. Congress has mandated liability where a creditor violates TILA, except in carefully specified circumstances reflecting reliance and equitable factors. The Court should not supplant the Congressional determination with a *Chevron* analysis.

TILA provides that "[e]xcept as otherwise provided in this section, any creditor who fails to comply with any requirement . . . with respect to any person is liable to such person . . ." 15 U.S.C. §1640(a). The limitations and exceptions to liability are then set forth. There is a one year statute of limitations. 15 U.S.C. §1640(e). In an individual action statutory damages are set at twice the finance charge with a $100 minimum and a $1000 maximum. 15 U.S.C. §1640(a)(2)(A). In class action cases the judge is given broad discretion in assessing damage ("such amount as the court may allow," based on such factors as the persistence of the conduct and the extent of intent); there is no minimum recovery per class member, and the total recovery may not exceed $500,000 or 1% of the creditor's net worth, whichever is smaller. 15 U.S.C. §1640(a)(2)(B). TILA also provides a defense grounded on the creditor's good faith reliance on official rules, regulations and interpretations of the Federal Reserve Board. 15 U.S.C. §1640(f). These and other provisions in the Act encompass reliance and equity factors analagous to those comprising *Chevron* analysis.

Despite the large proportion of cases this Court decides in which the results were "not clearly foreshadowed," *Chevron,* 404 U.S. at 106, to our knowledge the Court has never applied

a judicial non-retroactivity test, under any formulation, to bar actions where Congress has created a statutory cause of action for damages that contains special limitations on liability. Rather, the Court has applied the test contained in the particular statute, thereby deferring to legislative adjustments of reliance considerations and other equitable factors when the legislature has made such provision.[31]

City of Los Angeles v. *Manhart,* 435 U.S. 702, 718-19 (1978) (denying retroactivity based upon application of an explicit, statutory grant of judicial equitable discretion surrounding the Title VII cause of action). *See also Jimenez* v. *Weinberger,* 523 F.2d 689, 704 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976) (statutory cause of action "adequate" response to request for *Chevron* consideration). Thus the Court implicitly has accepted that the principles it has applied to determining the existence of a cause of action in the first place should also apply to the scope of limitations on the cause of action. The central such principle is that:

> The ultimate question is one of congressional intent, not whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.

Touche Ross & Co. v. *Redington,* 442 U.S. 560, 578 (1979).[32]

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[31] *Chevron* analysis is appropriate where Congress has not acted to balance claims of reliance and hardship. 42 U.S.C. §1983, for example, creates a cause of action covering a broad expanse of constitutional and statutory issues, and understandably contains no explicit limitations comparable to those in TILA. The Court has treated most remedies under §1983 as equitable remedies subject to *Chevron* analysis. *See Lemon* v. *Kurtzman,* 411 U.S. 192 (1973). *Lemon* is, notably, the only civil case since *Chevron* in which this Court has applied *Chevron.*

[32] If *Chevron*-type tests were universally applicable, there would be a substantial disincentive for Congress to specify legal or equitable limitations on liability. Such decisions should be committed to Congress for policy reasons alluded to in *Cannon* v. *University of Chicago,* 441 U.S. 677, 717 (1979), for preferring that Congress create a specific cause of action rather than leaving it to be implied by the courts.

In TILA Congress has afforded creditors protections similar to, and in certain respects greater than those provided by *Chevron*.[33] These Congressional judgments, effectively preempting the basis for judicial allocation of such interests, should not be augmented judicially.

VI. Even Under the Chevron Test the Ruling of This Court Should Not Be Prospective Only

Applying the three criteria of *Chevron* does not support only prospective application of this Court's decision. Ford Credit meets none of the criteria.

A. THIS COURT'S RULING FOR THE RESPONDENTS WILL NOT ESTABLISH A NEW PRINCIPLE OF LAW.

The first *Chevron* factor is whether the decision has established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," 404 U.S. at 106.[34] This factor is dis-

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See also, id. at 717-18 (Rehnquist, J. concurring); *id.* at 730-731 (Powell, J. dissenting); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 574-75, 578-79. When Congress does explicitly create a cause of action, this Court does not apply *Cannon*-type tests to determine if there is an implied cause of action. This Court should not apply a *Chevron* test to imply other limitations on liability.

[33] Ford Credit has not raised here nor could it have raised any objection to relief based on the statutory reliance and equity provisions.

[34] This Court has described a new principle of law meriting solely prospective application as "an avulsive change which caused the current of the law thereafter to flow between new banks," *Hanover Shoe, Inc.*, v. *United Shoe Machine Corp.*, 392 U.S. 481, 499 (1968), or a "clear break with the past," *Desist* v. *United States*, 394 U.S. 244, 248 (1969). *See also Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 721 (1978) ("[d]rastic changes"). The difference between "overruling clear past precedent" and issues "whose resolution was not clearly foreshadowed" is substantial. Decisions have seldom been given only prospective application based solely on the "not clearly foreshadowed" standard; a reversal of substantial past precedent has normally been present.

positive. If there has been no substantial change in the law, the party seeking to invoke *Chevron* has no equities and there is no reason to consider the other two *Chevron* factors. *Jordan* v. *Weaver*, 472 F.2d 985, 996 (7th Cir. 1976), *rev'd on other grounds sub nom. Edelman* v. *Jordan*, 414 U.S. 651 (1974). An affirmance by this Court would not overrule clear past precedent, nor constitute a decision on an issue of first impression in a manner not clearly foreshadowed.

The Act and Regulation Z have always mandated disclosure of "any security interest." 15 U.S.C. §1638(a)(10); 12 C.F.R. §226.8(b)(5). Regulation Z has always defined "security interest" to include any interest in property which secures payment or performance of an obligation. 12 C.F.R. §226.2(gg). Rulings of the FRB as early as 1970 gave notice that the security interest in returned premiums had to be disclosed. See Section I., *supra*. Case law has also consistently foreshadowed a decision for respondents in this case. Four Circuit Courts of Appeal and numerous other courts have ruled that TILA requires creditors to disclose this security interest. *See* n.10, *supra*.

Ford Credit's attempt to focus the "foreshadowing" issue on the state of the law in 1976, when Valencia and Gonzales signed their contract, is a smokescreen. Ford Credit is not contesting its liability to the respondents. Rather, Ford Credit and its *amici* seek to preclude liability in lawsuits that may be filed after this case is decided. Because of the short TILA statute of limitations, however, such suits would arise out of contracts that post-date not only the Seventh Circuit's decision in this case, but the decision in *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F.2d 437 (3d Cir. 1977), and both the decision and the denial of the petition for a writ of *certiorari* in *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979).[35] Even had the

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[35] Ford Credit's *amici* hypothesize a rule that creditors should never have to comply until after the "finality of a decision of a United States Court of Appeals, unless review by this court is sought . . ." (Brief at 29). Since the relief Ford Credit's *amici* seek relates to con-

Seventh Circuit (and the other circuits) applied *Chevron,* Ford Credit would still not have had the protection it seeks here. Thus the request is for protection against failing to follow appellate rulings during the pendency of an unsuccessful appeal. This is a gross distortion of *Chevron's* reliance concepts.[36]

Even if Ford Credit were permitted to base its reliance claim on case law prior to the execution of the contract in this case, the claim would still fail. The first ruling addressing the issue required disclosure and occurred prior to the execution of the contract in this case; the creditor found liable was Ford Credit. *Edmondson* v. *Allen-Russell Ford, Inc., and Ford Motor Credit Co.,* No. C75-940A (N.D. Ga. April 19, 1976), *aff'd,* 577 F.2d 291 (5th Cir. 1978) *cert. denied,* 441 U.S. 951 (1979). As long ago as 1976 prudent creditors were disclosing their security interest in insurance premium refunds. *See Bulger* v. *Thorpe Credit, Inc.,* 609 F.2d 1255, 1257 (7th Cir. 1979). Ford Credit focuses only on two 1976 federal district court decisions, *Gennuso* v. *Commercial Bank & Trust Co.,* 425 F.Supp. 461 (W.D. Pa. 1976), *rev'd* 566 F.2d 437 (3d Cir. 1977), and *Shanks* v. *Greenbriar Dodge, Inc.,* No. C76-1154A (N.D. Ga. 1976), *rev'd on other grounds,* 577 F.2d 296 (5th Cir. 1978). the *Gennuso* decision provides little, if any, support to Ford Credit; it held

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tracts signed after the denial of *certiorari* in *Edmondson,* the *amici* seek more relief than would be obtained under the rule they hypothesize. Even in a situation where the "rule" would apply, it is wrong. It removes any need to comply with provisions of the Act or regulations, or with district court or appellate court decisions; it approves lawlessness and overrides the statutory enforcement scheme; and it creates an incentive to prolong litigation rather than comply with the law. Equally puzzling is the *amici's* view of the merits, those members of *amici* doing business in states where they concede state law requires the disclosure (*amici* Brief at 20 n.42) have been knowingly violating the law for years.

[36] Ford Credit also seeks to preclude liability in 91 pending lawsuits. Its *amici* do not seek to preclude liability in pending lawsuits. Ford Credit does not indicate the date of signing of the contracts in the 91 lawsuits. Presumably a significant portion post-date the decisions by the circuit courts of appeal and arose in such circuits.

that a creditor's interest in unearned physical damage insurance premiums did constitute a TILA security interest.[37] Thus Ford Credit's reliance claim centers solely on the *Shanks* district court decision which was later reversed. Justice Cardozo recognized that reliance on a single trial court decision cannot provide a sufficient predicate for a claim of prospective-only application:

> We will not help out the man who has trusted to the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided. B. Cardozo, *The Nature of the Judicial Process,* 147-48 (1921).

B. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT NORMAL APPLICATION OF THE DECISION WILL RETARD OPERATION OF THE SECURITY INTEREST DISCLOSURE RULE OF THE *TILA.*

The second factor of the *Chevron* test examines the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard operation" of the rule. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 104-105 (1971). The burden of showing retardation of the rule is on the party seeking limited application of the decision.[38] *See, Linkletter* v. *Walker,* 381 U.S. 618, 625 (1965); *Great Northern Railway Company* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). *Murphy* v. *Ford Motor Credit Co.,* 629 F.2d 556 (8th Cir. 1980), required disclosure of the assignment of returned premiums. Ford Credit failed to persuade the court "that retroactive application of our ruling will impede the op-

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[37] The court's ruling that a TILA security interest could be disclosed on a document separate from other disclosure was reversed.

[38] In *Chevron, supra,* non-retroactive application of this Court's prior holding was predicated on the fact that, because of the anomalous position of the plaintiff himself, applying the holding would actually undermine the core purpose of the new rule of protecting plaintiffs like Huson.

eration of TILA or cause undue hardship or produce inequitable results." *Id.* at 561. The court expressly relied on Congress's intent, in the 1968 Act, to regulate disclosure and encourage the informed use of credit. *Id.* at 560. *See also Valencia* v. *Anderson Bros. Ford,* (J.A. 57).

Neither Ford Credit nor its *amici* argue that the rule of this case will be retarded by "retroactive" application. Rather, they argue that the rule will not be furthered by such application. The argument, however, begs the question. Any award of damages, in any context, by definition does not affect behavior occurring before the award. It is always true that, if the purpose is to affect behavior on the particular issue, "[t]his can only happen as to transactions that have not yet occurred." (*Amici* Brid at 26.) What does affect behavior is the *potential* for damages; it is this potential that Ford Credit and its *amici* seek to eliminate or suspend for whatever periods of time that may follow lower court decisions but precede this Court's decision. The attempt to dilute the potential for damages as a mechanism for furthering operation of TILA and its rules, however, directly contravenes Congress' determination. *See Jimenez* v. *Weinberger,* 523 F.2d 689, 703-04 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976) (statutory cause of action supports conclusion that retroactivity furthers the statutory purpose).

This Court has determined that TILA obligates the consumer credit industry to inform consumers of the terms of credit transactions. *Mourning* v. *Family Publications Service,* 411 U.S. 356, 377 (1973). Criminal procedures and penalties were distinguished from the "modest" civil recovery of TILA, and the Act's reliance on private enforcement. *Id.* at 376.

The Act is designed to correct "the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them." *Id.* at 363. While the Act shifted the burden of disclosure to the credit industry, the burden of enforcement is placed primarily on the private

sector, through civil damages actions. *Mirabel* v. *General Motors Acceptance Corp.*, 576 F.2d 729 (7th Cir. 1978). The Act relies upon creating a system of "private attorneys general" for effective enforcement. Damage actions are intended to encourage debtors to fully enforce their statutory rights. *Thomas* v. *Meyer-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973).

Recognizing that enforcement of TILA's purposes is dependent upon private civil actions, disclosure requirements should not be applied prospectively only, as that would discourage consumers from asserting their rights under the Act. *Travis* v. *Trust Co. Bank*, 621 F.2d 148, 150 (5th Cir. 1980); *See also Kessler* v. *Associates Financial Serv. Co.*, 573 F.2d 577 (9th Cir. 1977); and *Brown* v. *Termplan, Inc.*, 459 F.Supp. 160 (N.D. Ga. 1978).

Normal judicial application of the requirement to disclose the security interest in unearned insurance premiums will operate to enforce the purposes of the Act. Disembowling the statutory damage provision will only retard compliance with TILA and all of its rules and create an incentive to retain contract provisions that violate the Act.

C. NO INEQUITY IS IMPOSED ON ANY CREDITOR BY FOLLOWING THE GENERAL RULE THAT JUDICIAL DECISIONS APPLY TO PENDING CASES AND CASES BROUGHT WITHIN THE STATUTE OF LIMITATIONS.

The third factor in the *Chevron* test requires the Court to determine whether the normal rule of retroactivity will produce "substantial inequitable results." *Chevron Oil Company* v. *Huson, supra*, 404 U.S. 97 at 107. The test for "substantial inequitable results" has been stringent; only an "impact upon the administration of . . . [the] law so devastating as to need no elaboration," has sufficed. *Tehan* v. *Shott*, 382 U.S. 406, 419 (1966). *See also City of Los Angeles* v. *Manhart*, 435 U.S. 702, 722 (1978) ("devastating harm"); *Gosa* v. *Mayden*, 413 U.S. 665, 685 (1973). The burden of showing such results is on the party claiming that the decision's effect should be lim-

ited, and then the equities must tip "clearly" in his favor. *Jimenez* v. *Weinberger*, 523 F.2d 689, 704 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

The equity factor also presupposes that there was a new principle of law established and inquires whether the defendant relied on the prior rule in good faith. *See, United States* v. *Peltier*, 422 U.S. 531, 537 (1975). There is no inequitable result to Ford Credit in the present case[39] because, as demonstrated in Section VI.A, *supra*, no new principle of law was established. Furthermore, Ford Credit's action was a "conscious gamble."[40] *Valencia* v. *Anderson Bros. Ford, supra*, J.A., 57 n.16. Ford Credit and their *amici* now seek to avoid the consequences of their gambles.[41]

The impact of a normal application of the Court's decision will have a minimal effect on the creditors. Some damages under TILA will have to be paid to consumers. Payment of

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[39] The three TILA cases cited by Ford Credit (Ford Brief at 43) are unlike the case at bar. *McDaniel* v. *Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978), and *Ector* v. *Southern Discount Co.*, No. C78-899A (N.D. Ga. Sept. 15, 1980) (Ford Brief, Add. 11-17), gave their new rules prospective application because of reversals of prior decisions on the same issue. *Sneed* v. *Beneficial Finance Co.*, 410 F.Supp. 1135 (D. Hawaii 1976), was effectively reversed in *Kessler* v. *Associates Financial Services Company*, 573 F.2d 577 (8th Cir. 1977) on the non-retroactivity issue.

[40] Ford Credit could have requested an FRB opinion under 12 C.F.R. §226.1(d) and avoided the gamble. Presumably they did not in light of FRB pronouncements contrary to Ford Credit's position, *see* FRB Public Information Letter No. 377, *supra*, and the possibility of asking the courts for non-retroactivity after several years of unsuccessful litigation.

[41] Non-retroactivity in civil litigation has been applied primarily where innocent, relying third parties have been involved, rather than in cases as this in which the perpetrators of an unlawful act claim "inequity." *See, Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

these "modest" statutory damages, *Mourning* v. *Family Publications Services,* 411 U.S. at 376, is entirely appropriate, given the creditors' knowing failure to disclose this security interest. Financial impact alone is an insufficient basis to make a ruling prospective where there is no justifiable reliance. *Cash* v. *Califano,* 621 F.2d 626, 632 (4th Cir. 1980). Further, those damages will be relatively small because 1) the Act provides that a consumer must have a TILA claim adjudicated in a court of competent jurisdiction in order to enforce its damage provision (15 U.S.C. §1640(h)); 2) even when a consumer does have the damage claim adjudicated, the civil liability does not affect any substantive rights under the contract (15 U.S.C. §1610(d)); 3) the Act's brief statue of limitations limits the creditor's potential liability; 4) past experience shows that few consumers litigate this claim; and 5) the amount of damages the creditors may pay is insignificant compared to the benefit the creditors have reaped by hiding the clause.

1. Ford Credit contends that the Court's decision will "affect" the many outstanding contracts of Ford Credit and its *amici.* Ford Brief at 42. This is not true. The Act provides that the creditor's liability for a violation must be determined by a court of competent jurisdiction in an action to which such person was a party. 15 U.S.C. §1640(h).

2. The substantive rights under the contract are unaffected even where the civil damages are adjudicated in court. 15 U.S.C. §1610(d). The creditor's contractual rights to require payment, repossess the automobile upon default, cancel insurance and take the unearned insurance premiums, and all other substantive rights, remain enforcable whether or not a TILA damage claim has been adjudicated.

3. The one-year statute of limitations will quickly cut off Ford Credit's future exposure, if it has not done so already. Ford Credit modified its contract to comply with TILA in some regions as early as July, 1978. *See* Response to Ford Credit Cert. Pet., at 4, *Ford Motor Credit Company* v. *Edmondson,* No. 78-1072, *cert. denied,* 441 U.S. 951 (1979).

The new Ford Credit contract in Illinois was evidently in place as early as June, 1979. See Add. 2, lower left-hand corner. The statute of limitations on prior contracts will have run for affirmative TILA actions by the time this Court rules.

4. Ford Credit's past experience shows that few consumers litigate this claim. While Ford Credit's failure to disclose has been declared to violate TILA regarding the violation in question in the Third, Fifth, Seventh, and Eighth Circuits, and Ford Credit itself says there were millions of offending contracts over the years, there are only 91 claims regarding this violation pending against Ford Credit nationwide.[42] Ford Credit Cert. Pet. at 15. Even as to those creditors who did not modify their contracts in response to the various circuit court decisions, there is no reason to believe the result in this case will cause consumers to flock to court to make this claim. The incentive to file suit was as great before the ruling in this case. Moreover, the courts should not tolerate creditors perpetuating the use of a non-complying contract, thereby increasing the number of violations of the Act, and then attempting to rely on the increased number of potential plaintiffs as a ground for non-retroactive application.

5. The amount of damages the creditors may have to pay for hiding the clause is insignificant when compared to the benefits they have received under the clause. For example, it is indisputable that creditors have used large amounts of the undisclosed security over the years. If insurance premiums average $200 in a typical automobile transaction, and Ford Credit's exercise of its security interests is randomly distributed in time, the undisclosed security interest has allowed Ford Credit to take an average of an extra $100 in every default over the years. If Ford Credit has 10,000 reposses-

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[42] Ford Credit's *amici* concede that pending cases should not be barred by "prospective application," Brief at 29.

sions in an average year,[43] Ford Credit has actually recovered at least $10 million in undisclosed security interests in the last ten years. Such amounts dwarf any potential TILA exposure that non-disclosing creditors may face.

Finally, the damages Ford Credit may pay as the result of normal retroactive application of the Court's decision when compared with its net worth does not produce a substantial inequitable result. The damages from the 91 pending lawsuits[44] and the few additional suits which may be filed, if Ford Credit has not in fact modified its contract in other jurisdictions, are paltry in comparison to its total assets of $1.5 billion and net income of $153 million in 1979. Ford Motor Credit Company Form 10-K filed with the Securities Exchange Commission for Fiscal Year ending December 31, 1979. Commission File No. 1-6368.

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[43] This estimated figure is based on Ford's 1979 Form 10-K statement filed with the Securities Exchange Commission. Commission File No. 1-6368. Ford stated the value of its repossessed cars in 1979 at $39 million. Estimating the value of each car at $3,900, 10,000 cars a year are repossessed. In 1977 Ford Credit's *amici* General Motors Acceptance Corporation repossessed over 46,000 automobiles. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Credit Practices, 16 C.F.R. Part 444, Public Record 215-42 at 217.

[44] One of these was filed as a class action. The court in that case had broad equitable authority under TILA itself to consider fully the equitable defenses Ford Credit attempts to assert here. 15 U.S.C. §1640(a)(2)(B). Similarly "the potential for enormous liability in class actions" claimed by *amici* (Brief at 4) is illusory, since it is curbed by the statutory discretion. Ford Credit's liability for damages in the other 90 pending cases cannot exceed $90,000. 15 U.S.C. §1640(a)(2)(A).

CONCLUSION

For the reasons stated above, respondents respectfully request this Court to affirm the judgment of the Court of Appeals below.

Respectfully submitted,

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ADDENDUM

FEDERAL RESERVE press release

For immediate release November 28, 1980

The Federal Reserve Board today issued revised proposals for simplifying its Regulation Z, which implements the Truth in Lending, Fair Credit Billing and Consumer Leasing Acts.[1]

The Board requested comment by January 19, 1981.

The Board's proposals are a complete overhaul, restructuring and further simplification of proposals made in May taking into account comment received on the May proposals.

* * * *

Attachment 2

Questions on Which the Board Particularly Requests Comment

Definitions

5. Should a security interest be defined more narrowly than under the current regulation, to exclude a number of incidental property interests such as accessions, accessories and interests in insurance and unearned insurance proceeds? (§226.2)

GUARANTY

To cause the Seller to sell the Vehicle described on the front of this contract to the Buyer, on credit, each of the persons who signs below as a "Guarantor" guaranties the payment of this contract. This means that if the Buyer fails to pay any money that is owed on this contract, each one who signs as a guarantor will pay it when asked. Each person who signs below agrees that he will be liable for the whole amount owed even if one or more other persons also signs this Guaranty. He also agrees to be liable even if the Creditor does one or more of the following: (a) gives the Buyer more time to pay one or more payments, or (b) gives a release in full or in part to any of the other Guarantors, or (c) releases any security. Each Guarantor also states that he has received a completed copy of this contract and this Guaranty at the time of signing.

Guarantor _____ Address _____

Guarantor _____ Address _____

ASSIGNMENT

The seller (hereinafter called Seller) named on the face of the within contract (hereinafter called the Contract) sells, assigns and transfers to Ford Motor Credit Company (hereinafter called Ford Credit) Seller's entire right, title and interest in and to the Contract and the property (hereinafter called the Property) described therein and authorizes Ford Credit to do every act and thing necessary to collect and discharge obligations arising out of or incident to the Contract and this Assignment. In order to induce Ford Credit to accept assignment of the Contract, Seller warrants that: the Contract, and guaranty, if any, are genuine, legally valid and enforceable and arose from the sale of the Property; the Property is as represented to the buyer (hereinafter called Buyer) named therein who was quoted both a deferred payment price and a lesser cash price; the Contract was complete in all respects and Seller made all disclosures required by law, and in the manner required by law, prior to the execution thereof by Buyer; Buyer is not a minor, has capacity to contract and paid the downpayment stated in the Contract with his own funds; all statements made by or on behalf of Buyer and furnished to Ford Credit by Seller are true to the best of Seller's knowledge and belief, and Seller has no knowledge of any fact that would impair the validity or value of the Contract; title to the Property is vested in Seller free of all liens and encumbrances and Seller has the right to assign said title; and a certificate of title to the Property showing a lien or encumbrance for the benefit of Ford Credit or Seller has been or will be applied for forthwith if permitted by law. If there is any breach of any of the foregoing warranties, without regard to Seller's knowledge or lack of knowledge with respect thereto or Ford Credit's reliance thereon, Seller hereby agrees unconditionally to purchase the Contract from Ford Credit, upon demand, for the full amount then unpaid whether the Contract shall then be, or not be, in default. Seller further agrees that in the event Buyer or any other person makes a claim against Ford Credit alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claim and shall indemnify and save Ford Credit harmless from all loss, cost and expense arising therefrom. In addition, this Assignment includes the provisions of the paragraph initialed below by Seller; provided, that if none of the paragraphs below has been initialed by Seller, this Assignment shall include the provisions of the paragraph below entitled "Repurchase". The liability of Seller shall not be affected by any extension, renewal or other change in the time of payment of the Contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof or the release or non-perfection of any security thereunder. Ford Credit shall not be bound to exhaust its recourse against Buyer or any other person or any security Ford Credit may at any time have before being entitled to payment from Seller hereunder. Seller waives notice of the acceptance of this Assignment and notices of non-payment and non-performance of the Contract and any other notices required by law and waives all setoffs and counterclaims. This Assignment shall become effective upon delivery of the Contract to Ford Credit or upon Ford Credit's payment of the purchase price therefor, whichever first occurs.

Initial "WITHOUT RECOURSE" This Assignment of the Contract is and shall be without recourse against Seller, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective.

Initial "REPURCHASE" Seller guaranties payment of the full amount remaining unpaid under the Contract and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit, upon demand, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective.

Initial "LIMITED REPURCHASE" Seller guaranties payment of the full amount remaining unpaid under the Contract and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit, upon demand, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective; provided, that if Buyer satisfactorily pays the number of instalments under the Contract specified in the Ford Credit Retail Plan, this Assignment shall thereafter be without recourse against Seller, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective.

Initial "PARTIAL GUARANTY" Notwithstanding the terms of the Ford Credit Retail Plan, Seller unconditionally guaranties payment of the full amount remaining unpaid under the Contract, and agrees to purchase the Contract from Ford Credit, upon demand, for the full amount then unpaid whether the Contract shall then be, or not be, in default; provided, that at the time of any such demand by Ford Credit, Seller may, at his election, pay to Ford Credit the sum of $ _____ in consideration of being released from such guaranty obligation, and in such event, this Assignment of the Contract is without recourse against Seller, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective.

Initial "LIMITED TERM REPURCHASE" Seller guaranties payment of the full amount remaining unpaid under the Contract, and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit, upon demand, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective; provided, that if Buyer satisfactorily pays each of the first _____ instalments coming due under the Contract, this Assignment shall thereafter be without recourse against Seller, except as otherwise provided by the terms of the Ford Credit Retail Plan in effect at the time this Assignment becomes effective.

Initial "FULL GUARANTY" Notwithstanding the terms of the Ford Credit Retail Plan, Seller unconditionally guaranties payment of the full amount remaining unpaid under the Contract and agrees to purchase the Contract from Ford Credit, upon demand, for the full amount then unpaid whether the Contract shall then be, or not be, in default.

Initial "FORD DEALER RETAIL TRUCK FINANCE PLAN" Except for breach of any of the foregoing warranties this Assignment shall be governed by the "Ford Dealer Retail Truck Financing Agreement" heretofore executed by Ford Credit and Seller.

Initial "FORD FLEET TRUCK FINANCE PLAN" Except for breach of any of the foregoing warranties this Assignment shall be governed by the "Truck Fleet Sales Financing Agreement" between Ford Credit and Ford Motor Company, dated September 19, 1960, and a "Dealer Truck Financing Agreement" between Seller and Ford Motor Company, dated _____

ACCT. NO. _____ **ILLINOIS AUTOMOBILE RETAIL INSTALLMENT CONTRACT** DATE _____

Buyer (and Co-Buyer)-Name and Address (Include County and Zip Code)	CREDITOR Seller-Name and Address
"Buyer" means all persons who sign this Contract as Buyer or Co-Buyer	Assignee of Contract (See Assignment below): Ford Motor Credit Company, The American Road, Dearborn, Michigan 48121

The Buyer may buy the Vehicle described below for cash. The cash price is shown below in Item (1) "Cash Price". He may also buy the Vehicle on credit. The credit price is shown below in Item (10) "Deferred Payment Price". By signing this contract, the Buyer chooses to buy the Vehicle on credit under the agreements in this contract. **In this contract there is no promise as to the merchantability, suitability, or fitness for purpose of the Vehicle.** The Buyer may receive a separate warranty on the Vehicle.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck Ton Capacity	Vehicle Identification Number	Use For Which Purchased
							☐ Personal ☐ Agriculture ☐ Business ☐

INCLUDING:
☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐ _____

DESCRIPTION OF TRADE-IN:
_____ (Year and Make) _____ (Serial Number) $ _____ (Gross Allowance) $ _____ (Amount Owing)

ADDITIONAL PROVISIONS

A. Vehicle Ownership, Use and Care: The Buyer will take care of the Vehicle and will obey all laws in using it. The Buyer will not sell the Vehicle and will keep it free from the claims of other persons. The Buyer will use the Vehicle only in the state where he now lives unless the Creditor gives him written consent to use it in another state or unless his use of the Vehicle in another state is for no more than one month.

B. Vehicle Insurance: The Buyer will insure the Buyer and the Creditor against loss or damage to the Vehicle. The type and amount of insurance must be acceptable to the Creditor. The Creditor may buy the insurance if the Buyer does not, but the Creditor does not have to do so. If the Creditor buys the insurance, the Creditor may insure only the Creditor or both the Creditor and the Buyer. In either case, the Buyer must pay back to the Creditor what the Creditor pays for the insurance plus interest at the highest rate allowed by law. If the Creditor insures only the Creditor, the Buyer will not have insurance. Whether or not the Vehicle is insured, the Buyer must pay for it if it is lost, damaged or destroyed.

If a charge for insurance is shown below, the Creditor will try to buy the coverages checked for the term shown. The Creditor is not liable though if he cannot do so. If these coverages cost more than the amount shown for insurance, the Creditor may buy them for a shorter term or he may credit the Buyer for the amount shown for insurance. If the Creditor cannot buy any insurance, he will credit the Buyer for the amount shown for insurance. The credit will be made to the last payments due. If the Creditor does not buy the insurance, the Buyer must buy it.

☐ Comprehensive
☐ Fire-Theft & Combined Additional Coverage
☐ Towing & Labor Costs ($25.00 Limit)
☐ $ _____ Deductible Collision

Term: _____ Months $ _____

DETAILS OF TRANSACTION

(1) Cash Price		$ _____ (1)
Cash Downpayment	$ _____	
Trade-In (Description above)	$ _____	
(2) Total Downpayment		$ _____ (2)
(3) Unpaid Balance of Cash Price (Item (1) minus (2))		$ _____ (3)
(4) Other Charges		
Vehicle Insurance	$ _____	
Credit Life Insurance	$ _____	
Credit Disability Insurance	$ _____	
Official Fees	$ _____	
Taxes (Not in Cash Price)	$ _____	
License ($ _____),		
Title ($ _____), and		
Registration ($ _____) Fees	$ _____	
_____	$ _____	
_____	$ _____	
_____	$ _____	
Total Other Charges		$ _____ (4)
(5) Unpaid Balance – Amount Financed (Items (3) plus (4))		$ _____ (5)
(6) FINANCE CHARGE		$ _____ (6)
(7) ANNUAL PERCENTAGE RATE _____ % (7)		
(8) Total of Payments (Items (5) plus (6))		$ _____ (8)

(9) **Payment Schedule:** The Buyer will pay the Total of Payments (Item 8) to the Creditor in _____ monthly payments. Each payment, except the last one, will be $ _____. The last payment will be $ _____. Payments are due on the _____ day of each month. The first payment is due on _____, 19 _____.

☐ Comprehensive
☐ Fire-Theft & Combined Additional Coverage
☐ Towing & Labor Costs ($25.00 Limit)
☐ $ _____ Deductible Collision

Term: _____ Months $ _____

The Buyer may choose the person through whom Vehicle Insurance is to be obtained.

Liability insurance coverage for bodily injury and property damage caused to others is not included.

C. Credit and Other Optional Insurance:

(1) Credit Life Insurance by

_____

on the life of _____

_____

This insurance is for the term of this contract and is explained in a notice or agreement given to the Buyer on this date. $ _____

(2) Credit Disability Insurance by

_____

This insurance is for the term of this contract and is explained in a notice or agreement given to the Buyer on this date. $ _____

(3) Other Optional Insurance
(Describe and specify term)

_____ $ _____

_____ $ _____

Credit Life Insurance, Credit Disability Insurance and Other Optional Insurance is not required by the Creditor and is not a factor in the Creditor's decision to approve this credit. Credit Life Insurance or Credit Disability Insurance may be cancelled from its inception within 15 days from the date hereof by written request from each Buyer and any Guarantor. Upon cancellation, the entire charge therefor shall be refunded or credited to Buyer.

The Buyer asks the Creditor to buy the insurance for which an amount is shown above.

Buyer _____ Date _____

_____

(Cost of insurance to be included only if signed by each insured Buyer and dated)

(8) Total of Payments (Items (5) plus (6)) $ _____ **(8)**

(9) Payment Schedule: The Buyer will pay the Total of Payments (Item 8) to the Creditor in _____ monthly payments. Each payment, except the last one, will be $ _____. The last payment will be $ _____. Payments are due on the _____ day of each month. The first payment is due on _____, 19 _____.

(10) Deferred Payment Price (Items (1) plus (4) plus (6)) $ _____ **(10)**

(11) Security Interest: The Buyer gives the Creditor a security interest under the Uniform Commercial Code in the Vehicle, in all money or goods received for the Vehicle and in all insurance charges financed for the Buyer. This secures the payment of the monthly payments and all other amounts the Buyer now or later owes on this contract. It also secures the Buyer's other agreements in this contract.

(12) Prepayment Rebate: The Buyer may pay this contract in full at any time. If he does so, he will get a credit for the unearned part of the Finance Charge if it is **$1.00** or more. This credit will be figured on the sum of the digits method after first subtracting **$25.00.**

(13) Late Charges: The Buyer will pay a late charge on each payment not made within **10** days after it is due. The charge is **5** per cent of the part of the payment that is late, or **$5.00,** whichever is less. The Buyer also will pay any cost paid by the Creditor to collect any late payment. The Creditor's acceptance of any late payment or late charge does not excuse the Buyer's default or mean that the Buyer can keep making payments after they are due. The Creditor may accelerate the remaining payments and repossess the Vehicle, as explained below, if there is any default.

(14) Default: If the Buyer fails to make any payment when it is due, or if he fails to keep any other agreement in this contract, the Creditor may do either or both of the following:

a. Acceleration of Payments: The Creditor may require the Buyer to pay at once all remaining payments. The Buyer will receive a prepayment rebate as explained above when he pays.

b. Repossession: The Creditor may repossess the Vehicle. The Creditor may also take goods found in or on the Vehicle and hold them for the Buyer. If the Vehicle is taken back, the Creditor will send a notice to the Buyer. The notice will state that the Buyer may redeem (buy back) the Vehicle. It will also show the amount needed to redeem. The Buyer may redeem the Vehicle up to the time the Creditor sells it or agrees to sell it. If the Buyer does not redeem the Vehicle, it will be sold. The money from the sale, less allowed expenses, will be used to pay the amount still owed on this contract. Allowed expenses are those paid as a direct result of having to retake the Vehicle, hold it, prepare it for sale and sell it. Lawyers' fees and legal costs are allowed too. If there is any money left (a surplus), it will be paid to the Buyer. If the money from the sale is not enough to pay off this contract and costs, the Buyer will pay what is still owed to the Creditor, if allowed by law.

(15) General: Any change in this contract must be in writing and signed by the Buyer and the Creditor. The law of Illinois applies to this contract. If that law does not allow all of the agreements in this contract, the ones that are not allowed will be void. The rest of this contract will still be good.

Notice to the buyer.

1. **Do not sign this agreement before you read it or if it contains any blank spaces.**
2. **You are entitled to an exact copy of the agreement you sign.**
3. **Under the law you have the right, among others, to pay in advance the full amount due and to obtain under certain conditions a partial refund of the finance charge.**

Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

RETAIL INSTALLMENT CONTRACT

Buyer Signs _____ (Co) Buyer Signs _____

Guarantor Signs _____

I hereby guarantee the collection of the above described amount upon failure of the seller named herein to collect said amount from the buyer named herein.

Assignment: The Seller accepts this contract. If no other Assignee is named at the top of this contract the Seller assigns it to Ford Motor Credit Company under the Assignment on the back of this contract. If another Assignee is named, the Seller assigns this contract to the other named Assignee under the Assignment attached to this contract. When the Assignee buys this contract, it will be the Creditor.

Seller _____ By _____ Title _____

NOTICE – ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

DIVISION OF CONSUMER
AND COMMUNITY AFFAIRS

November 24, 1980

Enclosed are final versions of the following official staff interpretations of Regulation Z issued since the last mailing in March: FC-0169, FC-0170, and FC-0172. Notices of activity on official staff interpretations not yet finalized (FC-0171 and FC-0173), as well as a revised version of FC-0159 reflecting an additional extension of the letter's termination date, are being sent. Also enclosed is the one official staff interpretation of Regulation B, EC-0015, issued since the last mailing.

* * * *

12 CFR Part 226, FC-0173

FC-0173, a proposed official staff interpretation regarding security interest disclosures in closed end credit transactions was published for comment on September 24, 1980 (45 FR 63295). The comment period ended October 24, 1980. This proposed interpretation may not be relied upon until final action is taken.

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